



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 1358 OF 2016

(Before Hon. Justice Hellen S. Wasilwa on 21st May, 2020)

FRANCIS GOLOBA.....CLAIMANT

VERSUS

BOARD OF GOVERNORS

CHURCH ON THE ROCK ACADEMY.....RESPONDENT

JUDGMENT

1. The Claimant served the Respondent as an administrator until 28/12/2015 when his employment was terminated.
2. The Respondent is a learning institution registered under the Kenya Basic Education Act, 2013.
3. The Claimant has filed this claim to challenge the termination of his employment and the payment of his dues. In particular, he seeks the following reliefs:-

1) An order declaring that the Respondent's actions towards the Claimant amounted to unfair and unlawful dismissal of employment.

2) A certificate of service be issued to the Claimant.

3) An award of KShs. 3,362,700.00 tabulated as follows-

a) 12 months compensation for unfair and unlawful dismissal in the sum of KShs. 910,800.00.

b) 1 months' compensation pay in the sum of KShs. 75,900.00.

c) House allowance for the 20 years served amounting to KShs. 2,376,000.00.

4) Costs of the suit.

5) Any other relief that the court may deem fit to grant.

4. The Respondent filed a statement of defence in response to the claim denying the allegations contained therein and urged this court to dismiss the claim.

The Claimant's Case

5. The Claimant avers that he was employed by the Respondent on 1/10/1997 and has served the Respondent for over 20 years. He states that at the time of his dismissal he was earning a salary of Kshs. 66,000.00, exclusive of house allowance.

6. It is the Claimant's case that on 4/12/2015, he was sent on suspension for allegedly sexually harassing several ladies, contrary to the Respondent's policy. He responded to the suspension letter and raised various issues which were never responded to. The memorandum of claim does not outline the particulars of these issues.

7. The Claimant avers that on 21/12/2015, he received a text message from the Respondent's Director, Mr. Harley, inviting him to a meeting. The message did not specify the purpose of the meeting but indicated that it would be between the Claimant, the director and Pastor Shem. Consequently, the Claimant wrote to the Respondent seeking further information on the agenda of the meeting and indicated that he was ready to attend the meeting.

8. However, to his surprise, on 28/12/2015 he received the dismissal letter dated 21/12/2015. He avers that he was not given an opportunity to defend himself against the allegations as he was not afforded a hearing as required by section 41 of the Employment. He further states that there was no justified reason for his dismissal.

9. The Claimant states that he has never been issued with a certificate of service.

10. During trial, the Claimant adopted his witness statement dated 12/7/2016 as his testimony and the documents he had filed in this Court as his evidence. The said statement reiterates the averments made in his memorandum of claim as outlined hereinabove.

11. It was his testimony that Ms. Caroline's employment was terminated in 2012 after several disciplinary hearings regarding her conduct.

12. Upon cross-examination, he contended that he had raised the issue of house allowance with the director. He conceded that the allegations against him were indicated in his suspension letter. He explained that his letter of reply was delayed because he was on leave and had to procure the services of a bureau to write the reply. He denied receiving a second letter or refusing to attend the meeting. He contended that the sum of KShs. 467,370.00 that he had received was for his pension.

13. During re-examination he clarified that he had received his pension but contended that he had not claimed his pension.

The Respondent's Case

14. The Respondent denies employing the Claimant in 1997 and contends that the company was incorporated in 2003 and became operative in the same year. The Respondent avers that the Claimant was employed after his brother passed on due to a recommendation from a pastor at the Church on the Rock. The Respondent denies employing the Claimant as a head teacher.

15. The Respondent avers that though the Claimant's pay slips did not indicate that his pay was inclusive of house allowance, it was implied in the contract that the salary was inclusive of the same. They aver that the employees were aware of this fact and that the Claimant never raised any complaints regarding payment of house allowance, during the subsistence of his employment.

16. It is averred that the Claimant was employed at the commencement of the Respondent's business and at a time when there were no contracts governing his employment. However, contracts were eventually introduced by the Respondent.

17. It is the Respondent's case that the Claimant sexually harassed female employees, particularly, Ms. Caroline Eggy Khabutsi. However, this became known to the Respondent after a suit was filed against the institution.

18. It is further averred that the Claimant manipulated his position as the chairman of the disciplinary committee, to terminate Ms. Caroline's employment on account of redundancy. It is contended that being a member of the administration, the Claimant ought to have upheld its policies.

19. The Respondent confirms that on 4/12/2015, the Claimant was sent on suspension for breach of his employment contract and the Respondent's policy, by sexually harassing female employees such as Ms. Caroline. It is asserted that the suspension letter informed the Claimant of the right to defend himself and which was valid until 8/12/2015.

20. He was also informed that if he did not take advantage of the same, it would be assumed that he had waived that right. On 10/12/2015, the Claimant was sent a reminder regarding the reasons for his termination. The letter granted him a further 4 days within which to respond and defend himself against the allegations made against him.

21. However, the Claimant did not provide a reasonable defence. As such, he was summarily dismissed for breaching clause 9 (i) (e) of the Respondent's policy which provided that an employee would be summarily dismissed for conducting themselves in a manner that would bring disrepute to the institution and ministry.

22. It is the Respondent's position that the decision was necessary and lawful considering the Claimant's failure to appear before the disciplinary committee for nearly a month. It further posits that the claim is unwarranted and unripe for litigation.

23. David Rhow Hatley, a partner and founder of the Respondent, testified as RW1. He adopted his witness statement dated 1/8/2016 as his testimony, the documents filed as his evidence and which he produced as exhibits. The witness statement reiterates the averments made in the Statement of Defence as outlined hereinabove.

24. During cross examination, RW1 conceded that Ms. Caroline had not complained about sexual harassment in the case that she had filed against the Respondent but contended that she had made a complaint against the Claimant in 2015. He conceded that he had not adduced any evidence regarding the text message that had been sent to the Claimant informing him of the disciplinary hearing.

25. It was his concession that the Claimant was not paid his dues but contended that the sum paid to him was his service pay, paid in 2014 and not his pension. The witness was not re-examined.

26. Eric Kirea, an administrator since 2014, adopted his witness statement dated 1/8/2016 as his evidence. His statement equally reiterates the averments made in the Statement of Defence as outlined hereinabove.

27. During cross examination, it was his testimony that the other ladies who were allegedly sexually harassed by the Claimant were not willing to write a statement. He admitted that the Claimant was not invited for a disciplinary hearing as his employment was terminated after the issuance of the show cause letter. He stated that the Claimant was paid his salary at the time of termination.

The Claimant's Submissions

28. In his written submissions filed on 28/1/2020, the Claimant submits that the Respondent has failed to discharge its burden of proof as required in Sections 43 (1) and 47 (5) of the Employment Act, that his summary dismissal was for a justified reason and that due procedure was followed.

29. The Claimant submits that the Respondent failed to comply with substantive and procedural fairness as anticipated in sections 41 and 45 of the Employment Act. It is his position that it was unfair to summarily dismiss him solely based on Ms. Caroline's complaint without inviting him to a disciplinary hearing to defend himself against the allegations.

30. He relies on the case **Walter Ogal Anuro vs. Teacher Service Commission [2013] eKLR** where the Court held that for termination of employment to pass the test of fairness, there must be both substantive justification and procedural fairness. It explained that the former involved the establishment of a valid reason while the latter addresses the procedure adopted by the employer in effecting the termination.

31. The Claimant submits that he is entitled to payment of the housing allowance arrears claimed by dint of Section 31 and 74 (1) (i) of the Employment Act, as he was never provided with housing or paid house allowance. He contends that his basic salary was not inclusive of house allowance.

32. The Claimant submits that the Respondent owes him employment benefits for the period between 14/5/2014 and 28/12/2015 and contends that he was not paid his terminal dues at the time of termination.

The Respondent's Submissions

33. In its submissions filed on 30/1/2020, the Respondent submits that it has proved that the Claimant's dismissal was based on valid grounds as the allegations of sexual harassment made against him were grave and contrary to its principles.

34. The Respondent submits that the Claimant was accorded a fair hearing as required by Section 41 of the Employment Act. In particular, the reasons for his suspension were communicated to him but he never submitted his defence. He was then invited to a disciplinary hearing but failed to attend on the ground that an agenda had not been availed.

35. The Respondent cites the case of **Jackson Butiya vs. Eastern Produce; Cause 335 of 2011** as cited in **Pamela Nelima Lutta vs. Mumias Sugar Co. Limited [2017] eKLR** where the Court held that the Claimant could not claim that she had not been given an opportunity to be heard yet she had ignored the summons issued to her by her employer.

36. As regards the reliefs sought, the Respondent submits that the claim for one month's notice pay and 12 months' compensation for unfair and unlawful termination is untenable as the Respondent has demonstrated that the Claimant was accorded a fair hearing before his dismissal.

37. It is further submitted that the claim for house allowance is not supported by evidence as the Claimant has failed to prove that he was entitled to house allowance in addition to the salary he was earning. Lastly, the Respondent submits that they should be awarded costs, being the successful party.

38. I have examined all the evidence and submissions filed herein. I note that the Claimant was 1st suspended from duty vide a letter dated 4/12/2015 and reason given for suspension was that he took advantage of a number of ladies working within the Ministry in particular Caroline Eggy Kabhusti and that he sexually harassed and abused her and eventually sacked her from her job without a reasonable reason.

39. The Claimant replied to the suspension letter denying the said allegations.

40. Vide a text message dated 21.12.2015, the Claimant was invited to a meeting scheduled 23.12.2015. He responded the same day asking for the agenda of the meeting.

41. It seems no response was given to this request and no meeting was held. On 28/12/2015 the Claimant was thus dismissed from his duty summarily.

42. From the evidence adduced before Court, the issue of sexual harassment was the reason for the dismissal. However, the Complainant in the sexual harassment matter was never called as a witness.

43. In cross-examination, RW1 indicated that the said Complainant left the Respondent's employment in 2013 but reported the harassment in 2015. RW1 also indicated that he had no evidence that he send a text message to the Claimant inviting him to a disciplinary hearing.

44. RW2 also indicated that the Claimant was not invited to a disciplinary hearing but was terminated after the show cause letter.

45. From the foregoing, it is evident that though the Respondent suspected that the Claimant was involved in misconduct this being sexual harassment, no forum was given to establish this misconduct. The Claimant never faced his accuser over the said allegations. The opportunity to prove or disapprove these allegations would have been through a disciplinary hearing which was never to be.

46. Section 43 of the Employment Act 2007 states as follows:-

1) "In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee".

47. Section 41 of the Employment Act 2007 also envisage that before an employee is terminated or dismissed, an opportunity to explain himself must be provided.

48. In the case of the Claimant, the validity of the reasons for dismissal being sexual harassment have not been established.

49. There is also no opportunity accorded to the Claimant to explain himself.

50. Section 45 (2) of Employment Act 2007 states as follows:-

(2) "A termination of employment by an employer is unfair if the employer fails to prove:

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason:-

(i) related to the employee's conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure".

51. Given that the Respondent have not established the existence of valid reasons to dismiss the Claimant and given that there was no disciplinary hearing conducted against the Claimant, I find the dismissal was unfair and unjustified.

52. In terms of remedies, I find for Claimant and I award him as follows:-

1. 1 month salary in lieu of notice = 66,000/=.

2. Issuance of a Certificate of Service.

3. 6 months' salary as compensation for the unfair termination = 6 x 66,000 = 396,000

4. House allowance for 3 years before termination the rest of the Claim being time barred = 15% of 66,000 x 36 months = 356,400/=

TOTAL awarded = 818,400/=

Less statutory deductions

5. The Respondent will pay costs of this suit plus interest at Court rates with effect from the date of this judgment.

Dated and delivered in Chambers via zoom this 21st day of May, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Miss Mugo for Claimant – Present

Respondents – Absent